



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: November 24, 2009

CBCA 1501

OPPORTUNITIES FOR THE AGING HOUSING CORPORATION
AND OPPORTUNITIES FOR THE AGING HOUSING CORPORATION II,

Appellants,

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Respondent.

Ronald J. Harper of Harper & Paul, Philadelphia, PA, counsel for Appellants.

Jay A. Lauer, Office of the General Counsel, Department of Housing and Urban Development, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **BORWICK**, and **STEEL**.

SOMERS, Board Judge.

Appellants, Opportunities for the Aging Housing Corporation and Opportunities for the Aging Housing Corporation II, seek to appeal a decision by the Director, Department of Housing and Urban Development (HUD), Philadelphia Office. The decision required appellants to obtain new property management to oversee a housing project, based upon the reported failure by appellants to maintain the physical condition of the property.

Pending before the Board is HUD's motion to dismiss for lack of jurisdiction under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (2006) (CDA). HUD asserts that the Board does not possess jurisdiction over this dispute because the dispute does not involve a contract with the United States, express or implied, which would fall within the ambit of

the CDA. Appellants oppose the motion. For the reasons set forth below, we conclude that the Board does not possess jurisdiction to entertain this appeal.

Background

Section 202 of the Housing Act of 1959, as amended, Pub. L. No. 86-372, 73 Stat. 654, 667 (codified as amended at 12 U.S.C. § 1701q), authorizes HUD to make loans for housing for the elderly or persons with disabilities. These loans can be used to finance the construction, rehabilitation, or acquisition of housing projects.

HUD made two loans totaling \$15,360,300 under Section 202 to appellants for the construction of a housing project for the elderly located in Philadelphia, Pennsylvania. In conjunction with the loans, appellants and HUD entered into regulatory agreements, which set forth HUD rules for the property. Appeal File, Exhibits 5, 6. These agreements imposed obligations consistent with those set forth in the Housing Act of 1959, stating:

[I]n consideration of the making of the loan by HUD and the disbursement of any part thereof, and in order to comply with the requirements of the Housing Act of 1959, and the Regulations adopted by the Secretary pursuant thereto, the Mortgagor agrees for itself, its successors and assigns, and any owner of the mortgaged property, that in connection with the mortgaged property and the project operated thereon and so long as the loan is outstanding [to fulfill specified obligations].

Id., Exhibits 5 at 1, 6 at 1. Among other things, the agreements required appellants to: (1) make all payments due under the note and mortgage; (2) establish a reserve fund for the replacement of structural elements and mechanical equipment of the project; (3) maintain the mortgaged premises in good and substantial repair; (4) charge rent for Section 8 units in accordance with the Housing Assistance Payments (HAP) contract and comply with the obligations of the HAP contract; (5) maintain the project in good repair and condition; and (6) contract for the professional management of the project in a manner satisfactory to HUD. *Id.* Under the regulatory agreements, the Secretary has the authority to notify appellants of any violation of the provisions of the agreement. Appellants must correct any violations to the satisfaction of the Secretary.

In addition to the regulatory agreements, appellants entered into HAP contracts with HUD under which HUD provided housing assistance payments on behalf of eligible families to enable them to lease units in the project. Appeal File, Exhibits 7, 8. Each agreement defined the purpose of the contract as follows:

The [HAP] Contract (Contract) is entered into between the United States of America acting through [HUD] and Opportunities for the Aging Housing Corporation (Owner), pursuant to the U.S. Housing Act of 1937 (Act), 42 U.S.C. 1437, *et seq.* and the Department of Housing and Urban Development Act, 42 U.S.C. 3531, *et seq.* The purpose of this Contract is to provide housing assistance payments on behalf of Eligible Families leasing decent, safe and sanitary units from the Owner.

Id., Exhibits 7 at 1, 8 at 1. The HAP contracts, which were incorporated by reference by the regulatory agreements, required appellants to provide the tenants with certain services, maintenance, and utilities. The HAP contracts gave HUD the right to approve or disapprove of proposed rent adjustments as well as the right to obtain access to appellants' premises, books, and records. In addition, HUD had the authority to determine if appellants' actions failed to comply with the contracts. The HAP contracts each contained a Dispute clause:

Any dispute concerning a question of fact arising under this Contract which cannot be resolved by agreement between the HUD Field Office and the Owner may be submitted by the Owner to the Secretary of Housing and Urban Development. Both parties shall proceed diligently with the performance of the Contract and in accordance with the decision of the Field Office, pending resolution of the appeal.

Id., Exhibits 7 at 14, 8 at 14.

In June 2008, HUD conducted an on-site management and occupancy review, which resulted in appellants receiving a rating of "below average" on the projects' general appearance and security rating. As a result, HUD issued a notice dated September 26, 2008, terminating appellants' authority to self-manage the project for failure "to maintain the mortgaged properties in good and substantive repair and condition," in violation of the regulatory agreements. Appeal File, Exhibit 1. Appellants appealed this notice to the HUD Director of the Philadelphia Multifamily Hub, and then to the HUD Regional Director, but the appeals did not succeed. *Id.*, Exhibits 2, 3. Appellants next sought review from the HUD Office of Hearings and Appeals, which denied the matter as not within that office's jurisdiction. Appellants then filed an appeal with this Board, and seek to reverse the Director's decision, a reinspection, and a "referral to the Department Enforcement Center" if necessary. Complaint ¶ 19.

Discussion

Respondent has raised the issue of whether this Board possesses subject matter jurisdiction to entertain this appeal. Any party may challenge subject matter jurisdiction at any point in a proceeding, and, if the jurisdictional facts alleged in the complaint are disputed, it is incumbent upon the appellant to come forward with evidence establishing subject matter jurisdiction. Appellants bear the burden of establishing subject matter jurisdiction by a preponderance of the evidence. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Reynolds v. Army and Air Force Exchange Service*, 846 F.2d 746, 747 (Fed. Cir. 1988).

The Board's jurisdiction arises from section 3(a) of the CDA, which provides, in pertinent part:

Unless otherwise specified herein, this chapter applies to any express or implied contract . . . entered into by an executive agency for

- (1) the procurement of property, other than real property in being;
- (2) the procurement of services;
- (3) the procurement of construction, alteration, repair or maintenance of real property; or
- (4) the disposal of personal property.

41 U.S.C. § 602(a). The United States Court of Appeals for the Federal Circuit has held that the "unambiguous language" of the CDA "is limited to express or implied contracts for the procurement of services and property and for the disposal of personal property. It does not cover all government contracts." *Coastal Corp. v. United States*, 713 F.2d 728, 730 (Fed. Cir. 1983). The Federal Circuit has stated:

In determining whether [appellant's] contracts are within the scope of the Contract Disputes Act, we are mindful of the legislative intent behind that Act. Congress created the Contract Disputes Act to promote economy, efficiency and effectiveness in the government's procurement of goods. Accordingly, the associated regulations emphasize the buyer-seller relationship.

G.E. Boggs & Associates, Inc. v. Roskens, 969 F.2d 1023, 1027 (Fed. Cir. 1992); *see also Delta Steamship Lines, Inc. v. United States*, 3 Cl. Ct. 559, 569 (1983) (“It is rather the conventional contract for the direct procurement of property, services and construction, to be used directly by the Government, which is the type of Government contract covered by the Act.”).

Appellants assert that these contracts fall within the Board’s jurisdiction. They contend that the agreements are government contracts in the “‘procurement of services or property’ sense and the regulatory agreements are the result of a solicitation by HUD for the procurement of services or property, the construction, alteration, repair, or maintenance of property, or for the disposal of personal property,” which, they assert, brings the agreements within the purview of the CDA. Appellants’ Response to Motion to Dismiss for Lack of Jurisdiction at 7. It is not clear, however, on what basis appellants contend that HUD solicited these services. The terms of the agreements do not indicate that the parties intended HUD to procure services or property. The intent is to provide government financing so that appellant can procure goods and services.

In analogous cases, the HUD Board of Contract Appeals, one of our predecessor boards, held that it did not possess jurisdiction over HAP contracts, or over contracts between public housing authorities and their construction contractors, even though HUD funds the construction and has substantial administrative involvement under annual contribution contracts with the public housing authorities. The Board held that these contracts are only “tangentially connected” with government procurement of goods and services, and, in reality, are more akin to grant or sociological-type contracts designed to accomplish government social policy goals. *See, e.g., Blanco-Mora Enterprises, Inc.*, HUD BCA 94-G-136-C5, 94-3 BCA ¶ 26,974; *New Era Construction*, HUD BCA 88-3406-C6, 89-1 BCA ¶ 21,376 (1988), *aff’d*, 890 F.2d 1152 (Fed. Cir. 1989); *Kurtis R. Mayer and Pamela Mayer, d/b/a Mayer Built Homes*, HUD BCA 83-823-C20, 84-2 BCA ¶ 17,494. We find that rationale sound.

Neither the regulatory agreements nor the HAP contracts are contracts for the procurement of property, services, construction, alteration, repair or maintenance of real property, or the disposal of personal property.¹ They are, in essence, grant-type agreements with certain “strings” attached. *See, e.g., Coastal Corp.*, 713 F.2d at 730; *Busby School of*

¹ We note that the lack of a final decision from a HUD contracting officer conforming to the requirements of Section 6 of the CDA, 41 U.S.C. § 605, provides an additional ground for dismissal for lack of jurisdiction.

the Northern Cheyenne Tribe v. United States, 8 Cl. Ct. 596 (1985). Under these circumstances, the Board cannot assume jurisdiction over this appeal.

Decision

The appeal is **DISMISSED FOR LACK OF JURISDICTION**.

JERI KAYLENE SOMERS
Board Judge

We concur:

ANTHONY S. BORWICK
Board Judge

CANDIDA S. STEEL
Board Judge